



**Issue Exhaustion in Preenforcement  
Judicial Review of Administrative Rulemaking  
Committee on Judicial Review  
Proposed Recommendation | June 4, 2015**

1       The requirement that parties exhaust their administrative remedies (“remedy  
2 exhaustion”) is a familiar feature of U.S. administrative law. This doctrine bars a party from  
3 appealing a final agency action to a court until it exhausts prescribed avenues for relief before  
4 the agency.<sup>1</sup> Remedy exhaustion ordinarily applies only to administrative adjudications where  
5 an agency has established a mandatory appeals process by regulation or statute.<sup>2</sup> The related  
6 but distinct concept of “issue exhaustion” would bar a petitioner for judicial review from raising  
7 issues in court it had not raised before the agency, even if the petitioner had exhausted  
8 administrative remedies.<sup>3</sup> As with remedy exhaustion, the issue exhaustion doctrine initially  
9 arose in the context of agency adjudications.<sup>4</sup> Unlike remedy exhaustion, however, issue

---

<sup>1</sup> *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938).

<sup>2</sup> *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (holding that, “[w]hile federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, [5 U.S.C. § 704] [], by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates”).

<sup>3</sup> *See, e.g.,* *FiberTower Spectrum Holdings, LLC v. FCC*, No. 14-1039, slip. op. at 9 (D.C. Cir. Apr. 3, 2015) (“Because FiberTower failed to present its § 309(j)(4)(B) argument to the Commission, the Commission never had an opportunity to pass on it, and FiberTower thereby failed to exhaust its administrative remedies.”)

<sup>4</sup> *See* JEFFREY S. LUBBERS, *FAIL TO COMMENT AT YOUR OWN RISK: DOES EXHAUSTION OF ADMINISTRATIVE REMEDIES HAVE A PLACE IN JUDICIAL REVIEW OF RULES?* at 2-3 (DRAFT April 10, 2015) (Report to the Administrative Conference of the U.S.) [hereinafter *Lubbers Report*].



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

10 exhaustion can be applied by courts reviewing agency rulemakings. It does not preclude  
11 consideration of issues that were raised by participants in the rulemaking other than the litigant.<sup>5</sup>

12 Congress expressly required parties to raise all their objections before adjudicatory  
13 agencies in several judicial review provisions adopted during the 1930s, prior to the advent of  
14 modern rulemaking under the Administrative Procedure Act of 1946. Federal courts continue to  
15 enforce these provisions today,<sup>6</sup> although they may not always be jurisdictional.<sup>7</sup> The typical  
16 statute applies to agency adjudications, contains an exception for “reasonable grounds” or  
17 “extraordinary circumstances,” and permits the court to require an agency to take new evidence  
18 under certain conditions.<sup>8</sup> Only two statutes were identified as explicitly requiring issue  
19 exhaustion for review of agency rules—the Clean Air Act and the Securities Exchange Act of  
20 1934.<sup>9</sup> Both provisions were adopted in the 1970s, when Congress enacted numerous regulatory  
21 statutes with significant rulemaking provisions.<sup>10</sup> Since that time, appellate courts have

---

<sup>5</sup> See *e.g.*, *Portland General Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007).

<sup>6</sup> *E.g.*, *Operative Plasterers' & Cement Masons' Int'l Ass'n v. NLRB*, 547 Fed. Appx. 812 (9th Cir. 2013) (enforcing 29 U.S.C. § 160(e)); *Hill v. FCC*, 496 Fed. Appx. 396 (5th Cir. 2012) (applying 47 U.S.C. § 405).

<sup>7</sup> *E.g.*, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602-03 (2014) (“A rule may be ‘mandatory,’ yet not ‘jurisdictional,’ we have explained. Section 7607(d)(7)(B), we hold, is of that character. It does not speak to a court’s authority, but only to a party’s procedural obligations.”) (citations omitted); see also *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1148 (D.C. Cir. 2005) (“as a general matter, a party’s presentation of issues during a rulemaking proceeding is not a *jurisdictional* matter”) (emphasis in original).

<sup>8</sup> *E.g.*, 15 U.S.C. § 77i(a); 29 U.S.C. § 160(e); 42 U.S.C. § 1320a-8(d)(1).

<sup>9</sup> 42 U.S.C. § 7607(d)(7)(B); 15 U.S.C. § 78y(c)(1). Provisions governing agency “orders” have been held to apply to judicial review of rules. See discussion in *Citizens Awareness Network v. U.S.*, 391 F. 2d 338, 345-47 (1st Cir. 2004). See also *Investment Co. Inst. v. Bd. of Govs.*, 551 F.2d 1270, 1276-77 (D.C. Cir. 1977); *American Public Gas Ass’n v. Fed. Power Comm’n*, 546 F.2d 983, 986-88 (D.C. Cir. 1976). Issue exhaustion may be enforced when rules are reviewed under these provisions. See, *e.g.*, *ECEE, Inc. v. FERC*, 611 F.2d 554, 559-66 (5th Cir. 1980).

<sup>10</sup> Lubbers Report, *supra* note 4, at 13.



22 increasingly applied issue exhaustion when reviewing preenforcement challenges to agency  
23 rules.<sup>11</sup>

24         Judicial application of the issue exhaustion doctrine is often discretionary, particularly in  
25 rulemaking cases. Courts reviewing agency adjudications have inferred support for application  
26 of the issue exhaustion doctrine from remedy exhaustion statutes<sup>12</sup> or from agency regulations  
27 requiring issue exhaustion in administrative appeals.<sup>13</sup> Courts have also imposed issue  
28 exhaustion requirements in the absence of an underlying statute or regulation, such as in the  
29 Supreme Court’s 1952 decision in *United States v. L.A. Tucker Truck Lines, Inc.*, which reviewed  
30 an adjudicative order issued by the Interstate Commerce Commission.<sup>14</sup> In this case, the  
31 Supreme Court described the “general rule that courts should not topple over administrative  
32 decisions unless the administrative body not only has erred but has erred against objection made  
33 at the time appropriate under its practice” as one of “simple fairness.”<sup>15</sup> It also said that issue  
34 exhaustion promotes orderly procedure and good administration by offering the agency an  
35 opportunity to act on objections to its proceedings.<sup>16</sup>

---

<sup>11</sup> *E.g.*, *City of Portland, Or. v. EPA*, 507 F.3d 706, 710 (D.C. Cir. 2007); *Military Toxics Project v. EPA*, 146 F.3d 948, 956–57 (D.C. Cir. 1998); *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of the Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998); *see also* Lubbers Report, *supra* note 4, at 26-30 (describing application of the doctrine as well as varied precedent in appellate courts other than the U.S. Court of Appeals for the D.C. Circuit).

<sup>12</sup> *E.g.*, *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (interpreting 8 U.S.C. § 1252(d)(1)—which states that “A court may review a final order only if — (1) the alien has exhausted all administrative remedies”—to require issue exhaustion).

<sup>13</sup> *See Sims v. Apfel*, 530 U.S. 103 (2000) (citing examples from the Fourth and Ninth Circuit Courts of Appeals).

<sup>14</sup> 344 U.S. 33, 37 (1952).

<sup>15</sup> *Id.*; *see* *Advocates for Hwy. & Auto Safety v. FMCSA*, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).

<sup>16</sup> *Id.*; *see also* *Ctr. for Sustainable Econ. v. Sally Jewell*, Civ. No. 12-1431, slip. op. at 22 (D.C. Cir. Mar. 6, 2015) (holding on review of an agency adjudicatory decision that “the question in determining whether an issue was preserved,



36           However, questions about common law application of the doctrine were raised by the  
37 Supreme Court’s more recent decision in *Sims v. Apfel*, which held that judicial application of an  
38 issue exhaustion requirement was inappropriate on review of the Social Security Administration’s  
39 informal, non-adversarial adjudicatory benefit determinations.<sup>17</sup> While at least two appellate  
40 courts have continued to apply the doctrine on review of administrative rulemaking after  
41 considering *Sims*, courts have inconsistently adhered to this distinction.<sup>18</sup> Scholars have since  
42 observed that issue exhaustion “cases conspicuously lack discussion of whether, when, why, or  
43 how exhaustion doctrine developed in the context of adjudication should be applied to  
44 rulemaking.”<sup>19</sup>

45           As set forth below, the Administrative Conference’s research identified competing claims  
46 about the advisability of the doctrine. Its Recommendation urges courts to recognize that issue  
47 exhaustion principles developed in the context of adversarial agency adjudications may not  
48 always apply in the context of preenforcement review of rulemaking, but also recognizes that  
49 courts generally should not resolve issues litigants did not raise during the administrative  
50 rulemaking proceeding. It identifies circumstances where common law application of an issue

---

however, is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it.”).

<sup>17</sup> *Sims*, 530 U.S. at 108-12 (“[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding”).

<sup>18</sup> See *Advocates for Hwy. & Auto Safety v. FMCSA*, 429 F.3d at 1148-49; *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004). But see *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073 (9th Cir. 2013) (describing a Surface Transportation Board (STB) exemption as a rulemaking but applying the *Sims* rationale to it because “the STB’s procedures were informal and provided no notice to interested parties that to later challenge the STB’s decision one must submit comments during the exemption process.”).

<sup>19</sup> Lubbers Report, *supra* note 4, at 40 (citing PETER L. STRAUSS, ET AL, *GELLHORN AND BYSE’S ADMINISTRATIVE LAW* 1246 (10th ed. 2003)); see also *Korettoff v. Vilsack*, 707 F.3d 394, 399 (D.C. Cir. 2013) (Williams, J., concurring) (joining a decision to preclude preenforcement review of new issues but writing separately “primarily to note that in the realm of judicial review of agency rules, much of the language of our opinions on ‘waiver’ has been a good deal broader than the actual pattern of our holdings, and that that pattern itself may unfairly disadvantage parties that are generally not well represented by interest groups”).



51 exhaustion requirement may not be appropriate, and urges agencies to pursue an issue  
52 exhaustion defense in litigation only when they have a good faith belief that none of the  
53 exceptions would apply.

54         Regardless of whether an issue exhaustion requirement applies, the Conference believes  
55 that stakeholders and agencies typically benefit when issues are raised at the agency level prior  
56 to judicial review. It is advisable for participants in a rulemaking to raise even constitutional  
57 issues, which the Conference recommends should generally not be subject to an issue exhaustion  
58 requirement. In some cases, this will give the agency an opportunity to adjust its rule to eliminate  
59 the constitutional objection or at least to explain why its rule does not raise constitutional  
60 concerns.

61         Although the Administrative Conference recommends that statutes should, to the extent  
62 possible, be read to include the exceptions it sets forth in the Recommendation, it did not  
63 consider whether Congress should enact new statutory issue exhaustion requirements. The  
64 Recommendation is limited in scope to preenforcement review of agency rulemaking, where  
65 litigants seek direct review of a rule prior to its application to particular persons in enforcement  
66 proceedings.<sup>20</sup>

67 **Support for an Issue Exhaustion Requirement in Preenforcement Review of Administrative**  
68 **Rulemaking**

69         Many of the justifications for application of the issue exhaustion doctrine in judicial  
70 review of agency adjudicatory decisions apply squarely to review of rulemakings. Issue  
71 exhaustion is said to promote active public participation in rulemaking proceedings, create

---

<sup>20</sup> The passage of time and new entrants may complicate the inquiry in cases where a rule is challenged in response to an agency enforcement action. The Conference previously identified issues that Congress should not ordinarily preclude courts from considering when rules are challenged in enforcement proceedings. *See* Admin. Conf. of the U.S., Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings* (Dec. 17, 1982), available at [www.acus.gov/82-7](http://www.acus.gov/82-7).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

72 orderly processes for resolution of important legal and policy issues raised in rulemakings, ensure  
73 fully informed decisionmaking by administrative agencies and a robust record for judicial review,  
74 and provide a certainty and finality to rulemakings that conserves the resources of agencies,  
75 courts, and the regulated parties. There is also a concern that, without issue exhaustion, agencies  
76 may feel the need to try to anticipate new arguments in court that were not brought to their  
77 attention earlier, thus producing problematic delays and overburdening agencies.

78         The argument for judicial application of the doctrine in rulemaking may be especially  
79 strong in challenges under an arbitrary and capricious standard of review, such as where the  
80 challenge is to the factual basis of the rule or a claim is made that reasonable alternatives should  
81 have been adopted, or to an agency's failure to exercise its discretion in a particular manner. In  
82 those cases, judicial evaluation of the reasonableness of an agency's action may depend heavily  
83 on the administrative record or on contentions that were presented to the agency during the  
84 rulemaking. Application of the doctrine in such cases spares courts from hearing issues that could  
85 have been cured at the administrative level and reduces the need for agencies to create post-hoc  
86 rationalizations.

87         Judicial application of the issue exhaustion doctrine is arguably also compelling in  
88 challenges to rulemakings of particular applicability or more formal rulemakings, such as those  
89 that include a right to an evidentiary hearing. Even in informal rulemakings, potential  
90 commenters may have some responsibility to raise an issue that they may later invoke to  
91 challenge the rule in court.<sup>21</sup> Many agencies have adopted procedures for obtaining input on  
92 their rulemakings from interested stakeholders and the widespread use of electronic rulemaking  
93 dockets and other Internet- and social media-based outlets for public involvement have

---

<sup>21</sup> See *Koretoff*, 707 F.3d at 401 (Williams, J., concurring) (commenting that “[g]enerally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking”).



94 increased the public’s access to the government rulemaking process.<sup>22</sup> Moreover, the  
95 Administrative Procedure Act, 5 U.S.C. § 553(e), provides a procedural mechanism for addressing  
96 issues that were not presented to the agency during a rulemaking proceeding—the public’s right  
97 to petition agencies for amendment or repeal of rules. Additionally, several statutes containing  
98 issue exhaustion requirements, including the Clean Air Act and the Federal Communications Act,  
99 specifically provide for an agency reconsideration process.<sup>23</sup>

100 **Concerns with an Issue Exhaustion Requirement in Preenforcement Review of Administrative**  
101 **Rulemaking**

102           Nonetheless, some scholars and practitioners argue that courts should not uncritically  
103 apply issue exhaustion principles developed in the context of adversarial agency adjudications to  
104 the distinguishable context of rulemaking.<sup>24</sup> They query whether judicial precedent that fails to  
105 make such distinctions strongly supports general application of the doctrine in judicial review of  
106 administrative rulemaking. Critics of a prudential issue exhaustion requirement also cite the  
107 presumption of reviewability for final agency actions established by Administrative Procedure  
108 Act.<sup>25</sup> Some would go so far as to say that issue exhaustion should generally not apply in the

---

<sup>22</sup> See, e.g., Transparency in EPA’s Operations, Memorandum from Lisa P. Jackson, Administrator to All EPA Employees (Apr. 2009); see also Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking* (Dec. 5, 2013), available at [www.acus.gov/2013-5](http://www.acus.gov/2013-5); see also Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking* (Dec. 9, 2011) (describing observations of a variety of innovative public engagement practices at federal agencies), available at [www.acus.gov/2011-8](http://www.acus.gov/2011-8).

<sup>23</sup> E.g., 42 U.S.C. 7607(d)(7)(B); 47 U.S.C. 405(a).

<sup>24</sup> See William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 17 (2000) (offering examples to support the argument that “[u]nfortunately, some courts have ignored the specific statutory origin for [] [issue exhaustion] and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute”).

<sup>25</sup> 5 U.S.C. §§ 702, 704.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

109 absence of an authorizing statute, particularly in light of the high level of deference given to  
110 agencies on judicial review.

111 Those who are wary of generally applying the doctrine in review of administrative  
112 rulemaking also offer some policy arguments against its application. They point out that  
113 administrative agencies have an affirmative responsibility in rulemaking proceedings to  
114 adequately explain the basis and purpose of the rule, and to necessarily raise and decide issues  
115 that will affect persons who may not be represented. Some fear that overbroad application of  
116 the doctrine to rulemakings could serve as a barrier to judicial review for persons or firms whose  
117 interests are not in close alignment with those persons or firms dominating the associations  
118 representing group viewpoints and who reasonably do not find it worthwhile to engage in  
119 continuous monitoring of the agency in question.<sup>26</sup>

120 There is also a concern that issue exhaustion requirements may induce rulemaking  
121 participants to try to comment on every possible issue, or to save their comments for the last  
122 minute.<sup>27</sup> Some scholars fear that issue exhaustion requirements import the threat of litigation  
123 into administrative rulemakings, resulting in voluminous administrative records that raise further  
124 apprehensions regarding information overload or regulatory ossification.<sup>28</sup> Although some  
125 degree of foresight may fairly be expected, stakeholders may not be able to predict and comment  
126 on every contingency.

---

<sup>26</sup> *Koretzoff*, 707 F.3d at 401 (Williams, J., concurring).

<sup>27</sup> See Lubbers Report, *supra* note 4, at 38-40.

<sup>28</sup> See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1363-64 (2010).



127 **Exceptions**

128 Both sides agree that, even where statutes prescribe issue exhaustion, the case law  
129 recognizes certain exceptions.<sup>29</sup> For example, courts have relied on their equitable authority to  
130 read extraordinary circumstances exceptions, such as those traditionally applicable in remedy  
131 exhaustion cases, into statutes where they were lacking.<sup>30</sup> The Conference recognizes that courts  
132 applying the issue exhaustion doctrine prudentially retain some discretion to waive its  
133 application.<sup>31</sup> The following Recommendation seeks to offer guidance to the judiciary and  
134 agencies regarding when exceptions to application of the doctrine in review of administrative  
135 rulemaking may be appropriate.

### RECOMMENDATION

136 1. Courts should recognize that issue exhaustion principles developed in the context of  
137 adversarial agency adjudications may not always apply in the context of preenforcement  
138 rulemaking review.

139 2. As a general principle, in preenforcement review of administrative rulemaking, courts  
140 should not resolve issues that were not raised with sufficient specificity in the rulemaking  
141 proceeding to give the agency an opportunity to address them. This is particularly true for

---

<sup>29</sup> *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 681-82 (D.C. Cir. 1983) (“[Our] cases assume that § 405 contains implied exceptions without explaining why. We understand these cases, however, as implicitly interpreting § 405 to codify the judicially-created doctrine of exhaustion of administrative remedies, which permits courts some discretion to waive exhaustion”) (footnotes omitted).

<sup>30</sup> *Id.* (collecting cases); *see generally* Lubbers Report, *supra* note 4.

<sup>31</sup> When a court declines to apply issue exhaustion principles to preclude review of new issues, the agency must be given an opportunity to respond to that issue on the merits. Courts have a variety of options for soliciting the agency’s views. In appropriate circumstances, these may include permitting the agency to brief the issue or supplement the administrative record, or ordering a remand for the limited purpose of soliciting the agency’s views.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

142 challenges to the factual support for the rule in the administrative record or to an agency's failure  
143 to exercise its discretion in a particular manner.

144 3. Issue exhaustion should not preclude consideration of issues that were raised with  
145 sufficient specificity in the rulemaking proceeding by the petitioner or any other participant.

146 4. Except where a statute directs otherwise, judicial consideration of previously unstated  
147 objections in an administrative rulemaking proceeding may be warranted, for example, under  
148 the following circumstances:

149 (a) The agency addressed the issue in the rulemaking proceeding.

150 (b) The issue was so fundamental to the rulemaking proceeding or the rule's basis and  
151 purpose that the agency had a responsibility to address it. This narrow exception may  
152 include:

153 i. basic obligations of rulemaking procedure, such as well-recognized  
154 requirements of the Administrative Procedure Act or other government-wide  
155 procedural statutes, governing statutes, or regulations; or

156 ii. unambiguous limitations on the agency's statutory authority; or

157 iii. explicit or well established substantive criteria or requirements prescribed by  
158 applicable statutes or regulations.

159 (c) The litigant has demonstrated that the agency's established position on the issue  
160 would have made raising the issue in the rulemaking proceeding futile. Futility should not  
161 be lightly presumed.

162 (d) The issue could not have been raised during the rulemaking proceeding, such as  
163 because the procedures used by the agency precluded it.

164 (e) This issue is an objection that the rule violates the U.S. Constitution.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

165 (f) Other extraordinary circumstances excuse the failure to raise the objection in the  
166 rulemaking proceeding.

167 5. Agencies should consider the foregoing circumstances when deciding whether to  
168 assert issue exhaustion as a litigation defense.

169 6. Reviewing courts should allow litigants challenging administrative rulemakings to have  
170 a full opportunity to demonstrate that they did in fact raise an issue first with the agency or that  
171 any of the above circumstances—militating against application of the issue exhaustion doctrine—  
172 are present.

173 7. Agencies should be given an opportunity to defend the merits of a rulemaking against  
174 new objections raised in the judicial review proceeding.

175 8. To the extent possible, statutory requirements for issue exhaustion should be  
176 construed and applied in accordance with the foregoing recommendations. New statutory issue  
177 exhaustion requirements for rulemaking, if any, should also adhere to these recommendations.